OFFICE OF LEGISLATIVE LEGAL SERVICES
COLORADO GENERAL ASSEMBLY

STATE CAPITOL BUILDING, ROOM 091
200 EAST COLFAX AVENUE
DENVER, COLORADO 80203-1782

TELEPHONE: 303-866-2045
FACSIMILE: 303-866-4157
E-MAIL: olls.ga@state.co.us

SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

December 18, 2007

The Committee on Legal Services met on Tuesday, December 18, 2007, at 9:10 a.m. in HCR 0112. The following members were present:

Senator Veiga, Chair
Senator Brophy
Senator Tapia
Representative B. Gardner (present at 10:07 a.m.)
Representative Labuda
Representative Levy
Representative McGihon, Vice-chair (present at 9:24 a.m.)
Representative Roberts

Senator Veiga called the meeting to order.

Bob Lackner, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Secretary of State, Department of State, concerning campaign and political finance, 8 CCR 1505-6.

Mr. Lackner said the issue before the Committee this morning is part of the rules of the secretary of state concerning campaign and political finance, specifically rule 11.1. There is a conflict between rule 11.1 and a statutory provision within the "Fair Campaign Practices Act" (FCPA) and specifically section 1-45-109 (6) (b), C.R.S. Because of this conflict, we recommend rule 11.1 not be extended. As members of the Committee know, under article XXVIII to the state constitution, which was approved by the voters as Amendment 27, and under the FCPA, various committees and political parties engaging in certain campaign-related activity such as accepting or making contributions or expenditures are required to file reports disclosing the nature

of such activity and other required information. Requirements governing the nature of such disclosure are generally specified in section 1-45-109, C.R.S., and the rules. Requirements governing who is required to make disclosure and the type of disclosure are generally specified in section 1-45-108, C.R.S., and in the rules. Requirements governing the method of making disclosure are generally specified in section 1-45-109, C.R.S, and in the rules. Most reports are filed with either the secretary of state or the applicable county clerk and recorder. Since 2000, the secretary of state has been required to establish, operate, and maintain a system that enables electronic filing using the internet of campaign finance reports required to be filed. That provision is in section 1-45-109 (6) (a), C.R.S. Since the establishment of the electronic filing system, many filers have expressed a preference for being allowed to continue to file campaign finance reports manually instead of electronically and, until the promulgation of rule 11.1, the secretary of state has continued to allow persons to file reports by nonelectronic means. Reflecting this preference, the FCPA has never been amended to require electronic filing in all circumstances.

Mr. Lackner said the first sentence of rule 11.1, in its current form, reads all disclosure reports filed with the secretary of state pursuant to article XXVIII of the Colorado constitution and article 45 of title 1 of the Colorado Revised Statutes shall be filed electronically. During the last regular session of the General Assembly, which was the 2007 session that concluded this past May, a bill was introduced with the title "Concerning improvements to the secretary of state's electronic filing system for campaign finance reporting, and making an appropriation therefor." This was Senate Bill 07-259. This bill made a number of changes to section 1-45-109, C.R.S., including changes to subsection (6) of that section. As amended, the statute now reads, in the first sentence of paragraph (b) of subsection (6), in addition to any other method of filing, any person required to file with the secretary of state's office or with a county clerk and recorder may use the electronic filing system described in paragraph (a) of this subsection (6) in order to meet the filing requirements of this article. I want to underscore the use of the word "may". Rule 11.1 is in conflict with the statutory language just quoted from. Specifically, the rule requires that all disclosure reports filed with the secretary of state pursuant to article XXVIII and the FCPA be "filed electronically", subject to two limited exceptions that are discussed in footnote 2 on the bottom of page 3 of the memorandum. However, the statute plainly and clearly permits a person required to file such reports to use, in addition to any other method of filing, the electronic filing system. By authorizing the use of the electronic filing system, the statute implicitly if not explicitly permits a person to continue to file such documents by nonelectronic means, i.e., manually. If the statute does not permit filing by nonelectronic means, it is not clear what the use of the

word "may" should reasonably be understood to mean. Moreover, the fact that paragraph (b) goes on to specify action the secretary of state is required to take "where a person uses such electronic filing system", further underscores that there is a choice in filing methods offered by the statutory language. Accordingly, the statute gives a person filing disclosure reports a choice in the method of filing such reports between manual and electronic filing. Thus, in comparison with the rule, the statute does not bar the use of methods other than electronic filing and permits filing these reports by nonelectronic means.

Mr. Lackner said this Office recognizes that a different statute, section 24-21-111 (1), C.R.S., permits the secretary of state to require any filing to be made by electronic means as determined by the secretary of state. Moreover, this authorization is prefaced with the words notwithstanding any other provision of law to the contrary. This statute became law in 2004. We believe we are faced with a situation where we have a statute that was enacted in 2004 that gives the secretary of state general authorization to require electronic filing and a statute that was most recently amended in the last session this year, in 2007, pertaining to campaign finance reporting in particular that continues to allow filing of such reports by nonelectronic means. Insofar as the two statutory provisions cannot be harmonized, and we don't believe that they can, it is appropriate to consider rules of statutory construction under the legal authority cited in our memorandum. As applied to the two statutory provisions at issue, it is relevant that, under controlling case authority in our state, a special or specific provision prevails over a general provision unless the general provision was enacted later and the General Assembly has manifested a clear intent that the general provision should prevail. I also want to draw the Committee's attention on this point to section 2-4-205, C.R.S.,which similarly holds that a special provision prevails over a general provision unless the general provision is the later adoption and the manifest intent is that the general provision prevail. Under this authority, insofar as there is any inconsistency between sections 1-45-109 (6) (b) and 24-21-111 (1), C.R.S., the provisions of the FCPA at issue, that, as modified in 2007, allow continued filing by nonelectronic means in connection with the specific area of campaign finance reporting, should prevail over statutory provisions adopted in 2004 giving the secretary of state general authority to require electronic filing with no specific authority applicable to campaign finance reporting. Here, there is nothing to indicate the General Assembly manifested any intent that the standard expressed in section 24-21-111 (1), C.R.S., should control all areas of filing, including campaign finance reports. To the contrary, as noted above, the General Assembly has never enacted legislation specifically requiring the electronic filing of all campaign finance reports. At its last opportunity to address the issue, in 2007, the General Assembly enacted the statutory change

to section 1-45-109 (6) (b), C.R.S., that continues to permit the filing of campaign finance reports by other than electronic means. This Office is not challenging the secretary of state's express or implied authority to mandate electronic filings in general, but rather the specific conflict here between the rule and the plain language of the prevailing statutory section, section 1-45-109 (6) (b), C.R.S. Regardless of how the secretary of state intends this section to be interpreted, the only clear effect of its plain language is authorization for filers to file reports by other than electronic means, which conflicts with a rule expressly mandating electronic filing, subject to minor exceptions. As promulgated, rule 11.1 vitiates the statute. For these reasons, because rule 11.1 conflicts with section 1-45-109 (6) (b), C.R.S., we recommend that the rule not be extended.

Representative Levy asked what specific parts of section 1-45-109, C.R.S., were amended last session? Mr. Lackner said I can provide a copy of the bill, that shows extensive changes were made to section 1-45-109, C.R.S. It appears virtually the entire section was changed, including the sections I have mentioned that are at issue in this rule review matter.

Representative Levy said I guess I was specifically interested in paragraph (b) of subsection (6) and whether changes that addressed the method of filing were changed. Did the legislature really look at that provision? Mr. Lackner said the specific change to paragraph (b) is a technical change that does not bear on the specific issue before you. I think that was a point we made in our memorandum. However, clearly, paragraph (b) was before the General Assembly. That would have been a perfect opportunity to try to harmonize the rule, which was under consideration at that time, with that statute. As Senate Bill 07-259 was enacted, it left that language in there that any person may use the electronic filing system. In answer to your question, the specific issue before you today I don't recall was before the General Assembly at that time, but certainly that language was before the General Assembly and that would have been the appropriate opportunity to harmonize the rule that was under consideration as well as the relevant statutory provisions in this area.

Representative Levy said you'll have to refresh my memory, but when was the campaign finance act adopted? Mr. Lackner said others in the crowd I think have a better recollection than I do. I believe it was adopted in the 1990s. First you had Amendment 15, which was changed, but I can't remember what was struck down and what wasn't. In 2002, Amendment 27 came into place. You've had the FCPA in place, which has been changed over the years, in part in response to the constitutional article that is now in place as well. I can't remember exactly when the FCPA was originally enacted.

Representative Roberts said it seems like the "may" could be read to allow for the emergency requests and the less than 30 entries. I guess my concern is I think we're trying to move to an electronic system, and with the overhead costs and everything else that's tied into it, and the authority of the secretary of state to lay out these procedures, I'm trying to figure out why we're not working with that? Mr. Lackner said those are good questions. First of all, I think you raise a policy issue as far as the benefits of electronic filing, which is something that we're not getting into. We recognize that the secretary of state may have very good reasons and has presumably been pushed along by the General Assembly to a certain extent to go toward an electronic filing system. We're respectful of those reasons, but we're not getting into the public policy reasons for that. The reason I'm here is because we perceive this conflict between what's in the statute and what's in the rule. In part, I think the secretary of state will make the argument or has made the argument that that would accommodate the minor exceptions. It seems to me that if that's the case, I think in 2007 when the statute was before the General Assembly, that would have been a perfect opportunity to redo the statute. It could have been rewritten to say people shall use the electronic filing system except for such exceptions as the secretary of state shall promulgate by rule. I think if the statute had been amended that way, my guess is I would not be sitting here today because you would not have a rule issue. For better or worse, the statute doesn't say that and we think it reasonably can be read as permitting manual filing, which we think conflicts with the rule.

Senator Brophy said your argument here is because we didn't address the "may" provision of paragraph (b) with last year's bill, we're now asked to ignore the 2004 law, which allowed the secretary of state to exclusively ask for electronic filing. Is that accurate? Mr. Lackner said I might say it a little bit differently in that I think I'm here because we think there is a conflict between the statutory provision as it stands now and the rule. In bringing up the 2007 bill, I don't mean to emphasize that because the General Assembly did or didn't do something in 2007, that it's kind of exclusively why we're here. The fact of the matter is, regardless of the circumstances of that bill, there is a statutory provision in place that uses permissive language that conflicts with the rule. That statutory provision was enacted last year, which, under the authority that we have cited, was a particular provision relating to campaign finance, and we believe that authority should trump a statute that was promulgated in 2004.

Senator Brophy said I'm going to respectfully disagree with you. I spoke with Senator Gordon about this bill last year before we voted on it. As I recall, the intent of the bill was to encourage and/or force the secretary of state to make their electronic filing system somewhat user-friendly, as opposed to the mess

that it was. I believe that was the intent of the bill last year, which doesn't take away the intent of the 2004 law that allowed the secretary of state to force everybody to use electronic means in communicating with the secretary of state, which is a huge labor savings. So, we gave them the ability to do that in 2004. I actually think that this rule should stand and that the intent of the bill last year was to make electronic filing easier, so that people wouldn't squawk so much about the rule that the secretary of state was promulgating to force us to use all electronic means. That's how I read this thing.

Bill Hobbs, Deputy Secretary of State, Secretary of State's Office, testified before the Committee. He said, as Mr. Lackner pointed out, the authority for the rule is section 24-21-111, C.R.S., which does say notwithstanding any provision of law to the contrary, the secretary of state may require any filing to be by electronic means. I want to emphasize the rule does not require that every filing has to be by electronic means. The rule does say that filings of less than 30 entries do not have to be by electronic means and the rule also provides an exception for filers who have a hardship or can demonstrate other good cause. This specific issue that Mr. Lackner has raised has to do with section 1-45-109 (6) (b), C.R.S. I would suggest to you that it has a different meaning than has been suggested. I don't think it's intended to provide a choice of one form or the other. What I think it's intended to do is guarantee a right that people have to file electronically, and if you look at the legislative history of it, I think that's apparent. I wanted to call attention to where the language of rule 11.1 came from in section 1-45109 (6) (b), C.R.S. This was in a bill enacted in 1994, House Bill 94-1091. This was the bill that required the secretary of state to develop the electronic filing system. In section 1-45-104 (6) (a), C.R.S., as enacted by House Bill 1091, it says that by January 1, 1996, the secretary of state shall establish an electronic filing system. Paragraph (b) of subsection (6) says any person may utilize the electronic filing system. I think in that context, it's apparent that the legislature intended to require the secretary of state to offer access to everyone, but the secretary of state could not say that some filers could not use the electronic filing system. That still serves a purpose today. We would like for that language to stay in the law. Now, it has been relocated and amended in other ways over the years, but it still serves a purpose to ensure that the secretary of state cannot prohibit some people from using the electronic filing systems. For example, the secretary of state could not under this statute say that small donor committees cannot use the electronic filing system or people filing electioneering reports can't use it, or Republicans, or Democrats. The purpose of the language is to make sure everybody has the right to use it. I think that's what the "may" language is for.

Senator Veiga said on that point, isn't there a difference from the "may" language in the context you just read of ensuring that everybody has an opportunity to use the electronic system from the flip side of mandating that everyone is required to use the electronic filing system? Mr. Hobbs said if I understand your question, I think as I indicated, the rule still doesn't require everyone to file electronically. For those that are not required, in other words those that are filing smaller reports that have fewer than 30 entries, the statute still guarantees they have the right to use the electronic filing system. Does that answer your question?

Senator Veiga said for Mr. Hobbs to keep going and I'll let you know.

Mr. Hobbs said in any event, I'm just pointing out that I think if the General Assembly had intended this to be a guaranteed right of choice of one or the other, the legislature knows how to draft it that way. They would have said, any person may use either the electronic filing system or file manually. Instead, it's phrased in terms of "may" file electronically. And in the context of, in 1994, here was a mandate to develop the system, I think it was important to make sure that everybody had the opportunity to use it. I still think that's the case. I want to address the rule of statutory construction that's in section 2-4-205, C.R.S. Rules of statutory construction are really there as guides to legislative intent. Before looking at the exact text of section 2-4-205, C.R.S., I'd like to talk about legislative intent. When the General Assembly enacted section 24-21-111, C.R.S., in 2004, the intent clearly and specifically was to include campaign finance reports in that provision. Let me give you a little bit of background about that statute. This arose out of discussions that the secretary of state had with the joint budget committee (JBC). We had started, in 1999, in migrating our systems to electronic filing systems for business, lobbyists, charitable solicitations, and campaign finance, and we did various reports to the JBC showing the savings and the efficiency of electronic filing, as well as the accuracy, because instead of having staff reenter data, you've got the filers themselves directly transmitting the data. The JBC at our budget hearing in December of 2003 said you've got all these systems now, but there are varying degrees of utilization. What kinds of obstacles are there and do you need statutory authority to encourage electronic filing? What we said was, in systems like the business systems where we charge people, we can encourage electronic filing because it's simply cheaper to file electronically. That gets a pretty high rate of electronic filing. But with campaign finance, and this is what we told the JBC, we don't charge and so there's no built-in incentive to file electronically. In fact, there's a built-in disincentive. A lot of filers don't like to file electronically simply because if they file in paper, there's going to be days or, in some cases, weeks before the details of their reporting

is known until the staff can record it, and that means the committees can kind of protect their information from their opponents that way. The JBC directed us to work with their staff on language that would give us more authority to require electronic filing. What we told the staff of the committee was that with language like section 24-21-111, C.R.S., that we could reduce our FTE by 6.1 over a 3-year period, including 2 FTE in the campaign finance area. We have now done that. The fiscal note on the bill in 2004, which was introduced by 2 members of the JBC, included the 6.1 FTE reduction over a 3-year period. That's what section 24-21-111,C.R.S., is now. We have reduced our campaign finance staff in accordance with the bill by 2 FTE and we have gone successfully to electronic filing. I think we have about 600 filers. This rule took effect October 1, that was the first filing. I think we have about 600 committees. I think everyone filed electronically, except for about 25 committees that had the smaller amount and they weren't required to. In fact, there may have been other committees that could have filed manually that chose to file electronically. The statute gives them that right to do that. I now want to get back to section 2-4-205, C.R.S. As Mr. Lackner pointed out, the rule says that the specific controls over the general unless two conditions are met. I agree that the general here is section 24-21-111, C.R.S., and the specific is section 1-45-109 (6) (b), C.R.S., but I think those two conditions are met. The statute says the specific controls over the general, unless the general assembly makes its intent manifest for the general to control and the general is adopted later in time. I think both those conditions were met when the General Assembly adopted section 24-21-111, C.R.S. The intent was made manifest by the language that says notwithstanding any provision of law to the contrary. I don't know how more clearly the General Assembly could have said it, that it intended that general statute to override every contrary statute. The other condition in section 2-4-205, C.R.S., is that the general be enacted later in time. As I indicated, the "may" language was originally adopted in 1994 and section 24-21-111, C.R.S., was adopted in 2004. Mr. Lackner points out that the section was amended this year and I did quote at the bottom of page 4 of my memo what that change was to the entire subsection (6). This was kind of a clean-up portion of Senate Bill 259 and at the top of page 5 is the actual change to (6) (b). What was going on there was that, in cleaning up the statutes, Senate Bill 259 was consolidating what were separate provisions for filing with the secretary of state or filing with the county clerks. This amendment simply incorporated the county clerk filing with the secretary of state filing. Elsewhere in the bill, those county clerk provisions were deleted from the law. It was not an amendment that effected the permissive language that was originally adopted in 1994.

Mr. Hobbs said the last thing I just want to call to your attention is just how

important this rule is in carrying out the requirements of the constitution and the statutes that are imposed on the secretary of state. The rule-making authority in both the constitutional provisions and the statute is that the secretary of state is required, and I emphasize required, to adopt rules necessary for the administration and enforcement of the constitutional and statutory provisions. Both the constitutional and statutory provisions have legislative declarations and implementing sections that specifically say one of the key purposes of both the constitutional provisions and the statutory provisions is to ensure full and timely disclosure of campaign finance contributions. How does the rule promote full and timely disclosure? It promotes full disclosure because with electronic filing, we can promote that filings are complete and accurate. There are a number of ways that the electronic filing system does that. Just to give you one example, if you're an electronic filer and you report a contribution of $100 or more, the law requires you to provide the employer of that person. The electronic filing system knows that the contribution is more than $100 and it won't let you file unless you provide the employer. It helps to provide full disclosure and it also helps to provide timely disclosure because, as I indicated, when people file on paper on the deadline, it may be days or weeks before public disclosure is achieved. With electronic filing, it's all immediately available to the public whenever it's filed. Both of those goals are met that we're required to follow. The last thing I want to call to your attention is how effective this rule is in achieving those purposes. On page 7 of my memo, I quote an annual report that's produced by the campaign disclosure project, which is a project of the UCLA school of law and the center for governmental studies, and they rate the states every year or every 2 years. Here's what they had to say about Colorado after rule 11 was adopted: Colorado was one of the 5 most improved states in the 2007 study. The secretary of state's adoption of mandatory electronic filing for statewide and legislative candidates in 2007 pushed Colorado into the B range, a remarkable improvement over the D+ the state received in Grading State Disclosure in 2005. I just want to emphasize this really is important, I think, for full and timely disclosure.

Representative Labuda asked if there are any instances you discovered where people who are required to file do not have the electronic means available? Mr. Hobbs said I've only heard of one example. The rule does provide for hardship exceptions. We did have one hardship request, that I'm aware of, and only one for last fall. It was an agent for a small committee that said that they didn't have a home computer and that's the only example that I'm aware of.

Representative McGihon said rule 11.2.2 of rule 11, the hardship exception, says that applications have to be received at least 15 days prior to the

applicable filing date. That seems to me to frustrate what might otherwise be the hardship exception. Sometimes your hardship doesn't occur 15 days prior to the filing deadline and yet the rule doesn't have any out for that. How does that work toward meeting the requirement of filing? Mr. Hobbs said I'm not sure I have a direct answer for you now. I do recall debating when we were drafting the rule those kinds of questions. I'd be happy to look at the rule again in that respect. I don't think it goes to the rule-making authority, but I think one of the things that's a consideration is people do have options, even if their computer crashes, for example. They can file at a public computer at a library or something like that, but if this is something we need to reexamine, I'd be happy to do that.

Representative McGihon said it just seems it could frustrate disclosure, rather than assist disclosure. More to the point, it seems to me the crux of the dispute between you and Mr. Lackner is really the application of how we harmonize the two statutory provisions. You would harmonize them one way and he would harmonize them another. Is that really the essence of it? Mr. Hobbs said I think Mr. Lackner would say they can't be harmonized, that they're in conflict, and that section 1-45-109 (6) (b), C.R.S., provides a choice and the rule takes that choice away. I'm suggesting that they can be harmonized, that in fact we would still like to keep section 1-45-109 (6) (b), C.R.S., to ensure that everybody has that option and that it cannot be denied.

Representative McGihon said I don't see how you can say everyone has the option for electronic filing when we've just had a discussion that even under rule 11.2.2 you have to get permission and it's only a hardship exception. Either everybody doesn't have that option and you force them into electronic filing or everybody does have that option and you prefer electronic filing. Mr. Hobbs said everybody does have the option and that's what section 1-45-109 (6) (b), C.R.S., says - everybody may file. We require everybody to file except the smaller filers and those that have a hardship exception. We don't require everybody to file, but everyone, consistent with section 1-45-109 (6) (b), C.R.S., may file. We don't deny, and the statute prohibits us from denying, anybody that right.

Representative Roberts said if I understand what you're saying, we're mainly talking about the people who have 30 items or less, so what you're saying is the door is open to electronic filing even if you are the small filer even though you don't have to under your rule. It's kind of where you emphasize the "may" or how you interpret it. It's mostly not the hardship cases so much as the 30 or less and that they can electronically file. Am I understanding you? Mr. Hobbs said that's exactly it. I think for those that are not required to file, those that

have 30 or fewer entries, section 1-45-109 (6) (b), C.R.S., ensures that they are nevertheless entitled to file electronically.

Senator Veiga said I'm just mentally walking through your argument and I want to make sure I understand at least one component of it. Section 1-45-104, C.R.S., as initially drafted, basically authorized the secretary of state to establish an electronic filing system and then contained the (6) (b) language that said everybody may use it in addition to other methods of filing. Is it your contention that as that went through the process and was amended, most recently in 2007, the language in (6) (b) was just left there and so even though it contains that first sentence, in addition to any other method of filing, you don't believe there was any express intent by the legislature to sort of authorize, at that point, two methods of filing or an alternative method, other than your exceptions as we talked about? Mr. Hobbs said that's correct. The language you see in what was section 1-45-104, C.R.S., has been relocated to section 1-45-109, C.R.S., now and it's been amended numerous times over the years, but again, in ways that don't change that "may" language. That's what's been there from the beginning.

Senator Veiga said I guess I just really struggle with the first component, prior to the comma, "in addition to any other method of filing". I appreciate where the secretary of state is going and you've actually made some arguments that made me rethink Mr. Lackner's analysis. I'm still struggling with that a little bit. I do very much like the policy, but I'm just trying to reconcile all of it. I have a question for Mr. Lackner relative to his analysis of statutory construction when you say that the specific controls over the general and I understand that. What do you do with the comment made by Mr. Hobbs that in the discussion of the general, section 24-21-111, C.R.S., that there was a specific discussion by members of the JBC and those individuals carrying the legislation to include campaign finance in the discussion of the implementation of that statute? In your mind, does that change your thought process and all your statutory construction analysis? Mr. Lackner said I think that's maybe useful and interesting information for the Committee to consider. I think the fact is, in undertaking the statutory construction analysis, you still have to go with the plain meaning of these two statutes, even though you're undertaking analysis to determine which one governs. In my analysis of how the courts have undertaken this kind of analysis, you look at section 24-21-111, C.R.S., as it stands on the statute books and I think that's what gives you the conclusion that it's the general iteration. From the plain text of that statute, we know nothing about what the JBC was deliberating about and obviously those were valid deliberations. Again, we don't take exception to the policy arguments that have been advanced for the secretary's construction, but the fact

of the matter is, at the end of the day, I look at the statute that is general in its operation, that doesn't say anything about campaign finance, and could've but didn't, as compared with a statute that was most recently amended last year that specifically pertains to campaign finance reporting, that offers the permissive language that we think sets up this conflict between the statute and rule.

Representative Levy said I guess the problem I have with your analysis is that section 24-21-111, C.R.S., is a general statute and it's intended to be a general statute and the notwithstanding language is intended, I think, to override specific language. It's always going to be operative in a situation where you have a specific statute that may appear to be in conflict. I think the intent of section 24-21-111, C.R.S., was to override anything more specific. I understand your point about we could have amended it last session to bring them into harmony, but I think, again, the purpose of section 24-21-111, C.R.S., was to obviate the need to go back through the statutes every time and make sure there's no conflict. It's kind of a general sweep it all up and regardless of what all these specific statutory provisions mean, the secretary of state has the authority to require electronic filing. Otherwise, what you'd have to do is, you've got the campaign finance act, which was enacted prior to section 24-21-111, C.R.S., and you'd have to go back and parse all the different amendments and see when they were made to determine which one overrides according to your analysis. That seems to me really cumbersome. I have a separate problem with the fact that you've got a campaign finance reform article in one part of the statutes and you have to go to title 24, C.R.S., to find out that there may be an exception. That bothers me for other reasons. I guess I'm not quite going with you.

Mr. Lackner said I respect that. This matter has received lots of attention in our Office, leading to the point that we're bringing this to you and we certainly understand that section 24-21-111, C.R.S., is obviously the best argument for the other side. You and the other members of the Committee have to decide in the end how much weight to give that language. If you decide that language controls everything for the reasons you've articulated, then that's certainly a respectful position. We don't see a reason why the normal rules of statutory construction shouldn't pertain to that kind of enactment, but that's something you have to decide and you've raised good questions to consider in undertaking that analysis.

9:57 a.m.

Hearing no further discussion or testimony, Representative McGihon moved that rule 11.1 of the Secretary of State be extended and asked for a no vote.

The motion passed on a 4-3 vote, with Representative Levy, Representative Roberts, Senator Brophy, and Senator Veiga voting yes and Representative Labuda, Representative McGihon, and Senator Tapia voting no.

Bob Lackner addressed agenda item 1b - Rules of the Colorado Lottery Commission, Department of Revenue, concerning Colorado lottery commission compensation, 1 CCR 206-1.

Mr. Lackner said the specific rule we'll be discussing is rule 12.2. Our objection to rule 12.2 is based on two arguments. First, rule 12.2 conflicts with the commission's enabling statute, section 24-35-207 (6), C.R.S. Specifically, the rule prohibits members of the commission from receiving any monthly compensation for their services. However, the statute requires commission members to receive monthly compensation up to $100 per month. This argument provides one argument for not extending the rule. Second, in addition, in promulgating the rule, the commission has engaged in substantive policy-making in the absence of specific direction from the General Assembly to engage in such policy-making and has accordingly exceeded its authority. For these two reasons, we recommend that rule 12.2. not be extended. First, I'm going to take up the conflict issue. In promulgating the rule, the commission stated its purpose is to ensure compliance with article XXIX of the state constitution. Article XXIX concerns "Ethics in Government" and is more popularly known as "Amendment 41". As you know, Amendment 41, among other things, imposes certain gift bans on public officers, members of the General Assembly, local government officials, and government employees. Subsection (6) of section 2 of article XXIX provides the definition of "public officer". Under this definition, a "public officer" does not include any member of a state commission who receives no compensation other than a per diem allowance or necessary and reasonable expenses. Thus, by prohibiting commission members from receiving any monthly compensation for providing their services, apart from reimbursement for expenses, rule 12.2 has the effect of removing commission members from the types of individuals subject to the gift bans under article XXIX. However, section 24-35-207 (6), C.R.S., the statutory section that created the Commission and provided certain fundamental requirements for its operation, says commission members shall receive as compensation for their services up to $100 per month for each month in which there is an official commission meeting and shall be reimbursed for necessary traveling and other reasonable expenses incurred in the performance of their official duties. Thus, the statute directs commission members to receive as compensation for their services up to $100 per month for each month in which there is an official commission meeting as well as reimbursement for necessary traveling and other reasonable expenses.

Although rule 12.2 prohibits members of the commission from receiving any monthly compensation for their services, the statute clearly and plainly mandates exactly the opposite, which is the payment of compensation to commission members in an amount up to $100 for each month in which there is an official commission meeting. Because rule 12.2 conflicts with section 24-35-207 (6), C.R.S., we recommend that the rule should not be extended.

Mr. Lackner said our second argument is that the commission has exceeded its authority in promulgating rule 12.2. In 1982, the General Assembly passed legislation requiring commission members to receive as compensation for their services $100 for each day they are in attendance at commission meetings. Since that time, the statute has been amended on two other occasions. The legislative history is set forth in our memorandum, but the statutory mandate that commission members receive compensation has remained constant through the past 25 years as reflected in the current iteration of section 24-35-207 (6), C.R.S. The statutory requirement reflects a policy determination by the General Assembly that commission members should receive compensation up to a specific amount for their time spent on commission matters. The commission's rule-making powers are derived from section 25-35-208 (1) (a), C.R.S. The commission's rule-making powers are limited to promulgating rules governing the establishment and enforcement of the lottery as it deems necessary to carry out the purposes of part 2 of article 35 of title 25, C.R.S. Here, the commission on its own initiative has promulgated a rule that purports to eliminate monthly compensation for commission members for the purpose of exempting commission members from the requirements of article XXIX. In so doing, the commission has created new public policy concerning the fundamental administration of the commission and the applicability of constitutional requirements concerning ethics for public officers in the absence of any direction from the General Assembly to make policy on this issue. In the absence of specific rule-making authority, substantive policy determinations involving these issues are the prerogative of the General Assembly. Rather than using its powers to promulgate rules governing the enforcement and operation of the lottery, which is essentially games of chance administered by the commission, the commission has made new policy concerning the basic operation of the commission and the applicability of article XXIX to commission members that are outside the scope of its delegated rule-making powers, without specific direction to do so by the General Assembly. In so acting, the commission has exceeded its rule-making authority. If the commission wanted to change the underlying public policy determination governing compensation to effectively exempt these individuals from the scope of article XXIX, it should have sought a statutory change from the General Assembly. The commission is not

empowered to negate the statute by rule. Because the commission has exceeded its authority in promulgating rule 12.2 by making a policy decision appropriately left to the General Assembly, an additional argument is provided for not extending rule 12.2. I wasn't sure if someone from the commission was going to be here. It's my understanding that the commission is not contesting our recommendation and has asked that a copy of their memorandum be distributed. For the record, I just wanted to make sure that got included.

Senator Veiga said the memorandum has been distributed. They go through their discussion of why they did what they did and said they are not contesting the rule at this time.

10:06 a.m.

Hearing no further discussion or testimony, Representative McGihon moved that rule 12.2 of the Colorado Lottery Commission be extended and asked for a no vote. The motion failed on a 0-6 vote, with Representative Labuda, Representative McGihon, Representative Roberts, Senator Brophy, Senator Tapia, and Senator Veiga voting no.

Julie Pelegrin, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1c - Rules of the State Board of Education, Department of Education, concerning administration of the "Public School Finance Act of 1994", 1 CCR 301-39.

Ms. Pelegrin said what we have is an issue with regard to how you count kids. I think as everybody is aware, the school finance act is based in the number of kids who are enrolled. The amount of money a school district receives is on a per pupil basis. Every year, on the first of October, we count the number of kids who are enrolled in the school districts. In its rules, the department and state board require a student to receive at least 360 hours of teacher-pupil instruction and teacher-pupil contact in the semester of the official count date. Doubled for 2 semesters, that would be 720 hours of teacher-pupil contact in a year, which allows that kid to be counted as a full-time enrolled student. Let me start off by saying the school finance act does not specify within the act what a full-time student is. It's silent on it. It does give the state board fairly broad authority to decide what a part-time student is and it never specifies what a full-time student is. However, there are two other places in statute that do talk about how many hours of school a child should attend. First, section 22-33-104 (1) (a), C.R.S., on compulsory school attendance, sets out that kids between the ages of 6 and 17 will attend public schools for at least the following number of hours during a school year: 1,056 for a secondary school

pupil; 968 for an elementary school pupil; and 900 for a full-day kindergarten pupil. That actually is tied to attending school for those number of hours, and that's what kids are required to do under the compulsory school attendance act. Similarly, in section 22-32-109 (1) (n), C.R.S., school districts are required to calendar a certain number of hours of teacher-pupil contact time for each year. That's 1,080 hours, which can be reduced to 1,056, for secondary kids and middle school kids; 990 hours, which can be reduced to 968, for elementary school pupils; and 900 hours for full-day kindergarten, which can be reduced to 870. We decided that the easiest way to present this was through a chart. Under compulsory school attendance, secondary school pupils are required to attend for 1,056 hours per year, 528 hours a semester. School districts are required to plan 1,080 hours, maybe 1,056 hours, per year, 528 per semester. And under the school finance rule, a school district will be paid the full amount of per pupil funding for a student who attends for 360 hours in a semester, 720 hours for the year. The conflict is right there in the numbers. The question arises do the proscriptions with regard to scheduling and attendance dictate, under the school finance act, what a full-time student is? Honestly, that's for the Committee to decide and we figured we would bring it to the Committee. We know there's been a lot of consternation in the community, and I'm sure you all heard about it, but we thought we would bring it to you because, obviously, anytime the statutes don't appear to reflect reality, it's best to bring it to your attention and decide whether that's a problem.

Senator Veiga asked when is the official count date? Is it after the semester concludes? Ms. Pelegrin said the official count date is the first of October, so it's at the beginning of the semester.

Senator Veiga asked is that counting for the last semester? Ms. Pelegrin said Vody Herrmann can probably give you a better explanation of this, but on the first of October they count how many students have been enrolled for that semester and been attending prior to that date. There is actually sort of a window around that date that says they've been enrolled and are attending, so even if they're actually absent on the first of October, they still may be counted. But they look at the semester in which they count.

Representative Levy said maybe this is a better question for the department, but is this really just a math question? If the count date is October 1, that's approximately 6-7 weeks into the school year in most school districts. Is it possible that this rule is intended to account for the fact that a person could move into the school district shortly before the count date, be a full-time student from that date on, and only achieve 360 hours of school attendance because the count date isn't from the first of the school year? Ms. Pelegrin said

I don't believe that is the situation because the rule is phrased in terms of the pupil has a schedule as of the official count date, which provides at least 360 hours. I think what they look at is the whole schedule for the semester, not necessarily whether that particular student clocked 360 hours, but whether that student is scheduled for the semester to have 360 hours.

Tony Dyl, Attorney General's Office, with Vody Herrmann, Director of School Finance, Department of Education, testified before the Committee. Mr. Dyl said I'd like to begin by putting this into a bit of context. There has not actually been any rule change that is reflected in this review. The requirement in the regulation that full-time is 360 hours or more, and that part-time is 90 hours but less than 360, has been in the school finance rules, as far as we could tell, predating the current school finance act itself. We attempted to find out where these numbers came from and how long they've been in there. We found them as far back as 1988, that this has been the standard used in Colorado in terms of determining who is a full-time enrolled student or who is a part-time enrolled student. Obviously, these have been through numerous reviews and have never been questioned. It's the position of the department that the sections 22-32-109 and 22-33-104, C.R.S., speak to very different circumstances applicable to the local boards of education and to parents and pupils individually and do not really speak to the situation we are looking at when we're determining funded pupil enrollment for purposes of the school finance act. Section 22-32-109, C.R.S., actually outlines the specific duties of a local school district board of education. It states that local boards must determine the length of time which the schools of the district will be in session during the next school year. It does not actually speak to individual schedules of students at all, but to the length of time that must be offered by individual school districts. The hourly requirements, then, relate only there to the duties of the local district. It is entirely a different situation from looking at what would qualify for determining pupil count for school finance. Similarly, section 22-33-104, C.R.S., the compulsory school attendance law, is a duty that actually applies to the child and the parents. It sets forth the legal duty to parents and children to attend school between the ages of 7 and 17 for a minimum number of hours per year. It's enforced by the local board against children or parents through judicial proceedings, and, again, there is no mention in that law or relation to the public school finance rules for determining funded pupil count. We have been through the school finance act. There is only one reference to either of these statutes in the act. It references section 22-32-109, C.R.S., and it references not in relation to minimum number of school hours, but in relation to those districts that have a year-round calendar. It states when they have a year-round calendar pursuant to section 22-32-109, C.R.S., you use that calendar. The public school finance act

requires a definition of pupil enrollment. It's in section 22-54-103 (10), C.R.S. The definition of "pupil enrollment" for school finance is 2 pages long. Again, other than the prior reference that I've mentioned, there's no mention of the compulsory attendance law. It requires, essentially, attendance on the count date only, with numerous exceptions to try to capture every possible permutation of why a student may not be there on October 1. It specifically allows the counting of a pupil who is enrolled as less than a full-time student for school finance purposes. The department would submit that the fact that the school finance law allows counting for school finance purposes of a student who is less than full-time would indicate a legislative intent that the compulsory attendance laws do not apply in the different context of school finance. Obviously, if they did apply, you could not have a part-time pupil, that pupil would be a truant. Again, this is a very old and established standard. I honestly wish I could have come before you and told you why 360 and 90 hours were chosen. We tried to determine that, but we could not find it anywhere. It may be lost in the mists of time. However, perhaps the reason for this is to give school districts the maximum amount of flexibility without potentially affecting their funding, because you have students who are in all different types of situations, and the school finance act has to be flexible enough to account for all of those. To give you a few examples, you have the recently enacted fast college fast jobs program. A student could be fulfilling that program and have a less than full-time enrollment for compulsory attendance, yet they would be counted and funded under the school finance act at 85% of per pupil revenue. Also, the law provides that home-schooled students can enroll and attend regular courses in their school district for part of the year. Again, the school finance act and the regulations allow the school district to count that pupil generally for part-time or full-time, depending on the number of classes they're taking at the local district, even though they'd be taking less than the full number under the compulsory attendance law. Special education is another area where an individual education program might call for less than full-time enrollment, but that student could be counted full-time under the school finance act. Interestingly enough, truant students, those students who are in specific violation of section 22-33-104, C.R.S., can be counted as full-time students if the district has initiated legal action at that time to compel that pupil's attendance. Again, that would make a good deal of sense. That kid would not comply with the requirements of the compulsory attendance law, but if you have a district that is taking legal action to get them back in school, you would want funding to follow that kid into that school. Similarly, for suspended students, if they would return, those can be counted. Home-bound pupils who are home due to illness and are receiving some type of education can be counted. There's numerous reasons why you might want to look at funding school districts for school finance purposes a little

differently than you would look at the rules or a school board establishing its overall schedule of hours or parents and students and what they're required under the truancy laws in general for compulsory school attendance.

Representative Gardner said if I boiled down everything you just said, it is that there is not a linkage or should not be a linkage between the compulsory attendance requirement and the financing requirement itself. Mr. Dyl said I think that is partially correct. I would not say that we would use the same hours, that in fact there is a rational basis for drawing the distinction there between what might be used for compulsory school attendance and what might be used for funding pupil enrollment.

Representative Gardner asked Ms. Herrmann if she has any sense of what the effect is going to be if this rule is not extended? Ms. Herrmann said there is no way I can give you the total effect of what this rule would cause. There are multiple differentiations in the way that school districts calendar and schedule their students. There's sharing of students between school districts in many cases. There are all kinds of situations that require us to have extensive school finance rules to be able to go in and determine funding for each of these students. What we look at is the student's schedule on October 1, but we don't include in that student's schedule such things as passing time, study periods where they may not be necessarily supervised, or some of those things that may be included in the student's overall day. So, to determine just those actual pupil-teacher contact times that we're looking at does allow for school districts to have flexibility throughout in the students' schedules and individual parents are able to enroll their students as they see fit. I can't give you an overall impact. I don't know that number. I think it would be necessary for school districts to have a lot of input into this situation if this policy change were to take place that's been in place for nearly 20 years. The compulsory attendance laws have been in place, the calendar laws have been in place, these rules have been in place, and there's nothing that's changed other than adding in the full-time kindergarten and the part-time kindergarten and changing the top age for compulsory attendance from 16 to 17 and the bottom age from 7 to 6. This is something that the school districts have built in. They've got institutional, historic information on somebody that's been based on that. They've set their budgets based on these types of things and this would be a huge policy shift.

Representative McGihon asked Ms. Pelegrin to address the statement that this is a huge policy shift. Ms. Pelegrin said I unfortunately don't know the ins and outs as well as Ms. Herrmann does. I honestly can't tell you why this rule has been this way and the statutes have been this way for this long and we haven't had this conversation before. Maybe the Committee back in 1988 had this

conversation. I have no idea, we didn't go digging around in the sub-basement to go find out. I think I can understand how it would be a huge policy shift for the school districts. I guess I'm troubled by the aspect, whether it ends up being a policy shift for the districts or whether the General Assembly ends up considering a change to the statute, that we require students to be in school for 1,056 hours a year if they're a secondary pupil, and if that were applied then to how the funding worked, school districts would be very concerned. Seven hundred twenty hours for a whole year versus 1,056 is a big difference. I don't understand if it's all taken into account by passing periods and study times and lunch hours. It just raises a question in my mind in terms of how long is the school day and how much teacher-pupil contact are students getting? To me, it's something that maybe the General Assembly wants to consider as to whether the hours we have specified for compulsory school attendance are realistic.

Representative Levy asked is there a statute that's specific to the school finance act that determines eligibility for per pupil funding? Ms. Pelegrin said there is nothing in the school finance act that specifies what full-time is, how long a student has to be in the classroom or how may hours they have to be scheduled for in order to be considered full-time.

Representative Levy asked if Ms. Pelegrin perceives this rule as allowing a school district to violate the compulsory school attendance act? What do you see the practical effect of this apparent conflict to be? Ms. Pelegrin said from my perspective, sitting in the basement of the capitol, what it looks like is students are required to be in school for a certain number of hours. There's a concern maybe because the school finance act pays for the student as a full-time student for significantly less than that number of hours, the question is are school districts providing that much time for students to be in the classroom? Are we requiring students to be in the classroom for a certain number of hours that they can't be actually because school districts aren't providing that much classroom time? I can't tell from here. I think that's where it seems there ought to be a connection between these two things. I can understand why it wouldn't be mathematically the same because there's a lot of other things that come into play, but when you look at home-schoolers or you look at whether they have a disability and all that, that's all exceptions to these hour requirements under compulsory school attendance. If a student isn't in for 1,056 hours because they're home-schooled, it's not a problem, we've made an exception. If it's because they have a disability, it's not a problem, we've made an exception. But for the student who is required to be in this number of hours, it seems like unless there's some sort of special circumstance, that ought to be, or something close to that, the number of hours that we

consider full-time that you pay full-time for.

Senator Tapia said I'd like to ask the education board have you seen any abuse of the way the law is written and certain school districts minimizing contact time yet getting full funding? Do you see a problem? Ms. Herrmann said school districts are required to have a calendar. Their local boards are required to have a calendar. They're required to enroll their students and set schedules for those students. The only time we look at those schedules is on October 1 for that pupil count. Schedules can change throughout the year. Schedules change from 1st semester to 2nd semester. For us to really have a good answer to that, I don't. I think we would have to look at each individual school district and find out what their practices are to determine if they truly are in violation. Many of the elementary and middle school kids have full schedules. I don't think you'd see much of the flexibility that school districts may use at those levels because those are pretty set curriculums they're included in. It's when you get to the high school to where they may be shifting from a regular "brick and mortar" classroom schedule into some on-line classes or maybe even into some postsecondary options courses, that's where you're going to see more flexibility and it may not come out to the full 1,056 hours of pupil-teacher contact. What we look at is the schedule on October 1 and that's the only thing we have to go on for our determination of count. We look at that minimum requirement of the 360 hours in the first semester.

Senator Tapia asked if you recognize that there is a conflict here or at least a concern by this Committee and the staff, would you see a better solution than acting today to very possibly get together and do some statutory changes that refine what would make all of us more comfortable in terms of the requirements for students to have contact time? Mr. Dyl said I would actually like to say that although I don't think this is the proper venue in terms of a rule hearing, that would be an excellent idea and not only in regards to pupil contact time in "brick and mortar" schools, but as you know there are a wide variety of programs that have been enacted, I'm thinking in particular of on-line programs, where trying to determine pupil-teacher contact time is entirely different. Students work at their own pace. You might have a student who goes up 3 grade levels in one year in one particular subject. I think this is a wonderful conversation to have with the state board in terms of what we might look at in terms of statutory changes, not only in regards to this but especially in regards to the fact that due to technology how education services are actually being provided by districts is changing radically.

Senator Veiga said from a procedural standpoint, this is our last meeting before we start the session. I got called by one of my school districts, Adams

12, and I know by others in the audience, to go ahead and postpone or table this issue until our next meeting, but I've spoken with our staff and we don't have another meeting, so we do need to act on this issue today. Understand, whether we act on this today, whether it's included in the rule review bill in the preliminary draft or not, there's going to be a series of other occasions by which interested parties can come and testify before the legislature. The rule review bill goes through a number of different hearings, both in the House and the Senate, and it's generally not finalized until almost the conclusion of the legislative term. There will be a tremendous amount of input should we vote to include it in the bill at this time.

Representative Gardner said, to Ms. Pelegrin, this is an important policy discussion. I agree with Mr. Dyl it comes up in a rule review where I don't want to catch school districts who have budgeted in a difficult position. If we do not extend the rule today, can the legislature essentially fix the budget problem for all of those districts out there this session? I am troubled by this notion that we have 1,056 hours of compulsory attendance and it probably doesn't comport with the realities of the system and the realities of 21st-century education and it's not what we're doing for financing. I don't want to catch a lot of districts flat-footed and create 178 budget problems out there for people who get paid even less. Can we keep that from happening and at the same time force this discussion? Ms. Pelegrin said if you would vote today to not extend the rule, the rule itself would still be in place until the 15th of May, leaving the entire session for the General Assembly to consider a bill if someone would carry one to change the statute and make either the statute comport with the rule or find some place in between. There would be time this session for the General Assembly to do something about it. Honestly, if that didn't happen, and you still didn't want to catch 178 school districts flat-footed, at that point, you can still amend the rule review bill and pull it out. Nothing will happen to this rule until it actually passes in the rule review bill and then May 15 comes along. There would be the entire session to force the issue and determine whether you can come to a conclusion and if you can't still preserve the rule if you decide to do that.

Representative Levy said I appreciate Representative Gardner's question and Ms. Pelegrin's response. I guess I'm still struggling with in fact whether there is a conflict here, because I think we've got two different issues. Is the school district in compliance with the compulsory attendance act and with section 22-32-109, C.R.S.? I think that determination is made on a completely different basis. You look at the calendar, the schedule of classes, and determine whether they've complied with these attendance and scheduling requirements. I think school finance is a totally different question. I don't

know what the school finance act intended and whether it intended to mirror compulsory education or whether it was intended to allow full-time per pupil funding for something less. To me the conflict isn't as apparent. I appreciate Ms. Pelegrin's comments earlier about sitting here at the capitol there appears to be different numbers involved, but I think the numbers are intended perhaps for totally different purposes and it would be nice to know, but I don't see it as being quite as problematic.

Representative Labuda said just a comment to the folks who have come to testify. I am torn by this, because it looks to me like there is a very obvious conflict and therefore I would tend to say don't extend the rule. Yet I would wonder, during the legislative session, would we really have enough time to get everybody together to figure this out? On the other hand, do I vote to let the rule continue while folks get together to figure out how to fix it? Right now I'm struggling with that.

Representative Gardner said I think I'm persuaded by Representative Levy's analysis that I think has its basis in Mr. Dyl's, that there's not necessarily a linkage between these two statutes. For that reason, and I try to be bound on this Committee not by policy concerns in the first instance, because I think those decisions have been made elsewhere earlier, but whether or not statutory authority has been exceeded, and that's a pretty tough question and those things always get a bit confused. I think I'm persuaded by this notion that school finance and the requirements for hours at school is one question and compulsory attendance is the other. As a regulatory matter, there doesn't necessarily need to be some linkage. We don't have enough hours between now and the end of the day for me to discuss why now and whether it is good public policy that there's absolutely no linkage between the two because I think that's where we are. By the way, Representative Labuda, I'm convinced that if we didn't extend this rule today, 178 school districts and everybody in this legislature would figure out in 120 days how to solve that problem once you quieted the screaming on both sides. Nevertheless, I'm also persuaded that we have to come straight face-to-face with this and what we're paying for and what we're getting in return and what we're expecting in return. I just want to say to Ms. Pelegrin, thank you for bringing the issue forward because despite where I think my vote will turn out on this, I think this is something we need to look square in the face and tell the people of Colorado we're paying for one thing and we're insisting on another and we're not getting perhaps either one.

Ms. Pelegrin said one last thing to add, kind of to that point and to the paying for one thing and getting another thing. Assuming a 90-day semester, if you divide 360 by 90, you have 4 hours a day. If you divide 1,056 by 90, you have

a little over 11. That kind of brings down to a day what it means.

Senator Veiga said I appreciate the comments of Representatives Levy and Gardner. It's kind of my thought analysis as well. Ms. Pelegrin always does such a great job and I appreciate you raising the inconsistency between the school finance act and these other two statutes, but it troubles me from a couple perspectives. One, there is no express language in the school finance act that would link it back to the statutes. Two, the rule has been in place for such a long period of time and we don't necessarily know the history of the rule or what it was based on. I'm just concerned that maybe there wasn't intended to be a linkage. I'm equally concerned on the flip side about the policy discussions that I hope we do have in the next legislative session about really what this number is based on because I do think that you raise a very valid point that if it's not based on our statutory requirement for compulsory education or pupil-teacher contact hours, then what are we basing it on and should we have some sort of a linkage there?

Ms. Pelegrin said I actually need to correct myself. As Senator Brophy pointed out, I was using the whole year 1,056 hours versus a half year. It's actually much, much closer than that.

Representative McGihon said I agree with the comments of the Committee but my concern is how do we have that discussion absent not extending the rule? One of the things we could do is not extend the rule in order to force the discussion and amend the bill at the appropriate time if the discussion has occurred.

Senator Veiga said I actually thought about that, but I guess from a purely technical perspective I think that would be inappropriate based on what our charge is. My initial inclination, like yours, was let's go ahead and move not to extend the rule, put it in the rule review bill, and have that discussion over the course of the next legislative session, but I am not completely comfortable with the linkage, and that leads me to come to the other conclusion from a procedural perspective. I hope we don't drop the ball and I guess it's incumbent on all of us to continue to engage in the discussion if we find it important.

Representative Gardner said I agree with all of that. I'm not willing to be responsible for the amount of angst, aging, anxiety, and heart attacks for 178 school board members times whatever it is. If it were not for that and the complete disruption in the system and uncertainties in the system at our local school districts, I would vote not to extend this. I am unwilling to do that

because I think there is a very clear basis on which to extend it. I am committed to having this policy discussion about which I think there will probably be a great deal of disagreement, but it needs to take place.

10:46 a.m.

Hearing no further discussion or testimony, Representative Levy moved that rules 2254-R-5.04(3), 5.05(3), 5.06(3), 5.07 (3), 5.12(3), 18.05, and 18.07 of the State Board of Education be extended and asked for a yes vote. The motion passed on a 6-2 vote, with Representative Gardner, Representative Levy, Representative McGihon, Representative Roberts, Senator Tapia, and Senator Veiga voting yes and Representative Labuda and Senator Brophy voting no.

Chuck Brackney, Senior Staff Attorney for Rule Review, Office of Legislative Legal Services, addressed agenda item 1d - Rules of the Division of Motor Vehicles, Department of Revenue, concerning transporter and depot license plates, 1 CCR 204-14.

Mr. Brackney said these rules concern license plates, specifically transporter plates and depot license plates, sometimes called depot tags. These are license plates used to move unregistered vehicles from one point to another. The difference between them is transporter license places are used only by car dealers, whereas depot tags can be used not only by car dealers but also auto repair shops, auction houses, and businesses whose job it is to move cars from one place to another. The problem we think with the rules is they create a penalty for a certain violation beyond which the General Assembly has set out in statute. Section 42-1-204, C.R.S., is the general rule-making authority that gives the executive director of the department the power to make rules for the "Uniform Motor Vehicle Law", which includes license plates. It's very broad and the main thing I want to point out here is this is as specific as it's going to get. There really isn't much more than that. The violation in question is found in section 42-3-121, C.R.S. First, in paragraph (e) of subsection (1), it says that it's unlawful to use a false name or address or to knowingly make a false statement to register or renew an application for these license plates. Secondly, in paragraph (b) of subsection (2), it says a person who violates paragraph (e) that we just looked at commits a class 2 misdemeanor traffic offense. I looked it up to see what the exact penalties for that are, and they're found in section 42-4-1701 (3) (a) (II) (A), C.R.S. The range of penalties for a class 2 misdemeanor traffic offense goes from a minimum of 10 days imprisonment or a $10 fine, or both, to a maximum of 90 days imprisonment, a $300 fine, or both. That's a very specific range of penalties set out in statute

by the General Assembly. The transporter license plate rule, rule 2.4, says false information on the application may result in the denial of eligibility to obtain such plates for the following 3 years. They add what we believe is an additional penalty that we didn't see anywhere in the statute, that you will lose your eligibility to get a transporter license plate for the following 3 years if you do that. The depot plates are also found in another rule 2.4, which says that false information on the application may result in the denial of the licensee's eligibility to obtain such plates for the following 3 years. However, we think the division lacks the authority to add a penalty for this offense beyond what is found in statute. The General Assembly has already determined in section 42-3-121, C.R.S., what the appropriate penalties are for this violation. Absent any express authority from the legislature, the division is not authorized to add additional penalties not found in statute. Because rule 2.4 concerning transporter license plates and rule 2.4 concerning depot license plates exceed the rule-making authority granted to the department in section 42-2-204, C.R.S., they should not be extended. The division is not objecting to our recommendation regarding these rules.

10:52 a.m.

Hearing no further discussion or testimony, Senator Brophy moved that rule 2.4 of the Division of Motor Vehicles concerning transporter license plates and rule 2.4 of the Division of Motor Vehicles concerning depot license plates be extended and asked for a no vote. The motion failed on a 0-7 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, and Senator Veiga voting no.

Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 2 - Approval of the Rule Review Bill and Sponsorship of the Rule Review Bill and Other Committee on Legal Services Bills: Revisors' Bill(s) and the Bill to Enact C.R.S.

Ms. Haskins said the Committee sponsors the rule review bill every year and at this point, what we're asking the Committee to do is approve the bill. We'll redraft the bill to incorporate the votes you took today, so the rules that were not extended today will be added to the bill and that's what will be introduced at the beginning of the session. We're asking the Committee to approve the bill with the amendments we need to make to reflect your votes for today.

10:54 a.m.

Hearing no further discussion or testimony, Representative Levy moved for approval of the rule review bill as set before the Committee and amended as pertaining to the action we took today. The motion passed on a 6-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative Roberts, Senator Brophy, and Senator Veiga voting yes.

Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed the Committee on the other two bills the Committee sponsors. Ms. Gilroy said I'm here to request your help with the revisor's bill. We've actually been working on constructing the revisor's bill this year. It has about 35 pages of technical, nonsubstantive corrections to the statutes. These are generally missed conforming amendments, harmonizations, and different changes we need to make to add to the clarity and certainty of the statutes. We're authorized by statute to do so. In addition to that, we always do an annual bill to enact the statutes. After you all finish your work in the regular session or if there's a special session, although this year there was not, and also if there's anything that's changed in the law by the election, which this year there was not, we then compile all the statutes. Sometimes we need to harmonize, renumber, and move things around, but those are eventually put into statute and combined together and compiled. We ask that you sponsor a bill to enact the statutes. It's generally one of the first bills the governor signs so that makes the law the permanent law of the state of Colorado. Those are the two bills I'm seeking this Committee to sponsor again this year.

Senator Veiga asked if either bill has to be started in one house or the other? Ms. Gilroy said no, they were both actually House bills last year but there is no requirement either way.

Senator Veiga said we need motions to enact the Revisor's Bill and I'm assuming designate who is going to be carrying the bill, and then likewise with respect to the bill to enact the C.R.S.

Representative Gardner and Senator Brophy said they would sponsor the bill to enact the C.R.S.

10:57 a.m.

Hearing no further discussion or testimony, Representative Gardner moved to introduce the bill to enact the C.R.S. The motion passed on a 7-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, and Senator Veiga voting yes.

10:58 a.m.

Hearing no further discussion or testimony, Representative Labuda moved to introduce the Revisor's Bill, with herself as the House sponsor. Senator Brophy said he would sponsor the bill in the Senate. The motion passed on a 7-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative McGihon, Representative Roberts, Senator Brophy, and Senator Veiga voting yes.

Charley Pike, Director, Office of Legislative Legal Services, addressed agenda item 3 -Update on OLLS Budget for FY 2007-08.

Mr. Pike said our approach this year is a bit unusual. We don't have the itemized budget for you. Part of the difficulty this year is that the executive committee determined several weeks ago that they wanted to increase the hours for legislative aides from the 330 to 420, and as a part of that decision-making, they discussed the situation with the overall legislative budget. What's involved there is that the money for the legislative aides has, for the last 4 or 5 years, not been included as a part of the legislative budget. It's been done with an asterisk, which indicates that the money for the legislative aides would come out of any moneys in the House or Senate budget that would otherwise revert at the end of the year that had originally been appropriated for other purposes, such as, for example, the 20 days of special session or the committee expenses for the interim that might not have been used because there were fewer committees or fewer committee meetings than would have been anticipated. As a result of their discussions about increasing that potential unfunded liability for legislative aides, they also talked about the fact that last year, you all passed the bill to increase the per diem for members and did not provide funding for that on the assumption that it could come out of the reversion as well. Plus, the mileage is pegged to a federal change, and that has increased without any specific source of funding as well. The executive committee would like now to get those items back into the budget specifically, and for that reason, asked all of the staff agencies to go back and look at our budgets to see what we could cut out of our operating expenses, provide for increases in personal services in accordance with some guidelines that we refer to as the common policies that will be applied to the executive branch and also apply to the legislative branch, and try to come up with a number for the overall budget that will allow us to add the aides into the budget in a specific line item as well as the per diem costs. Because we're currently working on that, we're not prepared at this point to give you the budget. We'll have to come back to you in January. For two reasons, I wanted you to know about that. One, so that you know what the legislative budget

overall is facing and there's likely to be a bill introduced very early in the session to address the money for the legislative aides. Secondly, that we'll bring you our budget probably in January when we get a better feel for what that number is likely to be.

Senator Veiga asked what's the proposal going to be in terms of how many hours for legislative aides? Mr. Pike said from 330 to 420.

Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, said for those additional hours alone, it's about $102,000.

Representative Labuda said it pains me to realize that something I need will come at the expense of another department somewhere, because there's no additional money readily available to pay for this probably. Mr. Pike said that's part of why we're trying to squeeze the budget, so that it doesn't have to necessarily come in the context of you either have to pick this or this. The other thing I did forget to mention is that an unfunded liability that's been added to the budget were the expenses relating to the television production of the House and Senate chambers. That, again, was not specifically provided for in an item in the budget and needs to be absorbed in next year's budget.

The Committee next addressed agenda item 4 - Appointment of a person to fill a vacancy on the Commission on Uniform State Laws.

Senator Veiga said Representative Cerbo previously held this position. I understand that he has verbally resigned. Is that where we are at this point? Mr. Pike said yes, when we put this item on the agenda, we assumed, I think prematurely, that Representative Cerbo had submitted his resignation. We began to ask around and it seemed that no one had a copy of the letter of resignation. I did have a conversation with Representative Cerbo about 30 minutes ago. He reaffirmed to me that he has in fact resigned and we simply need to coordinate to get the letter. I think the Committee can go forward, if you're inclined to do so, and appoint a successor to Representative Cerbo. You might want to make it on the basis that we'll have obtained the formal letter of resignation as soon as possible.

Senator Veiga asked what's the process by which we appoint? Is it a vote of the Committee? Mr. Pike said it is simply a vote of the Committee and of course you all need to determine an appropriate candidate. If you have someone in mind, you would put that name in nomination and take a vote to appoint that person to serve for the remainder of Representative Cerbo's term, which is about a year. Then, subsequently, new appointments would be made

by the new General Assembly.

Representative McGihon said perhaps we should use today as a discussion item and consider who might be appropriate. You cannot be a member of the commission unless you are an attorney admitted in the bar of Colorado in order to represent Colorado. We are limited in who potential candidates might be and my suggestion would be we consider this - it should be a House member, since we are filling a House member's vacancy.

Senator Veiga asked if we have two vacancies on the commission? Mr. Pike said there is only one vacancy and it would be Representative Cerbo. I'll look for the statute, but my recollection is that of the six members, at least two have to be serving members of the General Assembly and at least two have to be nonlegislators. I think we currently have at least two legislators without Representative Cerbo. I think you could select someone who is not a member of the General Assembly. I think the commission members have often preferred that you have additional members of the General Assembly serve because that helps carry the legislation that is ultimately recommended to the General Assembly. That's a judgment you all would make in this instance. The Speaker makes it in the initial instance with regard to the three appointments he makes and the Senate President makes three appointments. As you can tell, there were two members of the House serving at the same time and one member of the Senate.

Representative Veiga asked who is the member of the Senate? Mr. Pike said Senator Gordon.

Representative McGihon said there are two members of the Senate, including Senator Shaffer. Mr. Pike said yes, you're absolutely correct.

Senator Veiga asked do I take it from the discussion that we can appoint anyone from the General Assembly or anyone outside of the General Assembly, potentially, depending on your analysis of the statute? Mr. Pike said I believe that's correct. You could appoint an attorney who is a nonlegislator or an legislator who is also an attorney.

Senator Veiga asked should we take this under advisement and consider it at our first January meeting or is there something that is occurring in the Uniform Law Commission? Mr. Pike said there is no real activity or meetings that a newly appointed member would have to participate in. They do a publication each year that includes all of the newly appointed members as well as the currently serving members. That publication is being prepared right now. The

fact that it would not include a new member is problematic but not very much so.

Senator Veiga said my inclination, since we have a sparse Committee at this point, is to consider this and take it up at our next meeting given there doesn't appear to be anything terribly significant pending that this person will miss. If anyone has any issues they want to raise now, otherwise I think I'll just table this until the January meeting.

Senator Veiga asked Mr. Pike if it would be possible for the Office to give the Committee the requirements of the person we should appoint between now and January or you can tell us now if you have that available? Mr. Pike said sure. The statute does say six members shall be appointed or reappointed by joint resolution of the General Assembly. At least two shall be appointed from the General Assembly and at least two from the public at large. It goes on that appointments to fill vacancies shall be made by the Committee on Legal Services for the unexpired term.

Senator Veiga said I guess it would be helpful for me at least to know who currently is on the commission and the makeup of those persons, their backgrounds. Representative McGihon said I can help you with that and also tell you that Colorado has seven commissioners and in addition, Mr. Pike serves as ex officio. The current members include Stan Kent, who is a trust estate attorney from Colorado Springs, Don Mielke, who we all know is a former member of the General Assembly and an attorney, Senator Shaffer, Senator Gordon, and myself. Tom Grimshaw is a life member, which means he has served as a uniform law commissioner in excess of 20 years, so he becomes a life member and not subject to appointment. Mr. Grimshaw is an attorney and also a former member of the General Assembly. What's nice is that we have a bipartisan commission at this point and that is the purpose of the commission. We have Republican members as well as Democrats and I think that's been fairly important as well.

Representative Levy asked if Representative McGihon or Mr. Pike could describe the duties and functions of the commission? Mr. Pike said in brief, the commission is created as a national organization to discuss and recommend to the states laws that ought to be uniform in application across the country. The premier product of the Uniform Law Commission is the "Uniform Commercial Code". That's been the original product and one of the reasons the commission was brought together. Similarly, they've approached other areas of the practice of law and adopted uniform acts to address the issues that come up on an annual basis. The commission may be dealing with as many as

10 or 20 separate drafting projects through the course of a year. The process itself is that the members who are appointed can volunteer to serve on drafting committees and if they're appointed to that role, they may attend two or three, perhaps more, drafting meetings during the course of the year. The conference itself gets together annually for about a week and at that annual meeting, the uniform acts are read line by line to the entire assembly and are debated and amended much like a legislative process that you're familiar with here. Ultimately, once a particular bill has gone through that process for two or three years, depending on the complexity of the issue, it's submitted to a vote of the states and then once the vote approves that act, the uniform act is actually written and comments that the drafting committee developed as they went through the project are put out and made available to the states to consider for adoption. The commission will also recommend that certain acts be targeted for consideration by the states, where there is an emphasis on trying to get uniformity across the state or to prevent federal preemption in certain areas. The federal government has looked to the commission to try to address certain issues that might require uniformity across the country before they do something. That's a thumbnail sketch.

Representative McGihon said for example, last year this body passed two targeted acts. One of them was the "Uniform Emergency Volunteer Health Practitioners Act" in order to have a registry across the states in the event of another Hurricane Katrina. The other was the "Revised Uniform Anatomical Gift Act" in order to encourage organ donation.

Representative Labuda asked if Mr. Pike also said two have to be nonattorneys? Mr. Pike said two have to be nonlegislators. They have to be attorneys from the public at large. Currently serving in that regard is Don Mielke and Stan Kent.

Senator Veiga said we'll table this issue until January. Mr. Pike said he assumes by then we'll have the actual letter of resignation.

11:19 a.m.

The Committee adjourned.